Supreme Court of the United States

PETITION FOR REHEARING OF DECISION

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IN THE

Supreme Court of the United States

October Term, 1948—No. 351

ROBERT A. MCALLISTER,

Petitioner,

—v.—

COSMOPOLITAN SHIPPING COMPANY, INC.,

Respondent.

Statement

WE FULLY APPRECIATE THAT THIS COURT NECESSARILY GAVE SERIOUS, CAREFUL AND DELIBERATE CONSIDERATION TO THE MAIN ISSUE INVOLVED HEREIN, AND THAT THE EFFECTS OF A DIFFERENT DECISION HEREIN MIGHT RESULT IN SERIOUS CONSEQUENCES TO BOTH NATIONAL AND INTERNATIONAL INTERESTS OF THE UNITED STATES, AND BE FAR REACHING AS A BASIS OF LIABILITY AFFECTING THE IMMUNITY OF GOVERNMENT VESSELS IN FOREIGN PORTS, AS WELL AS IMMUNITY FROM REGULATION AND TAXATION BY LOCAL GOVERNMENTS, AS STATED IN THE CASE OF *CALDAROLA* v. *ECKERT*, 133 U. S. 155. WE DO NOT SUGGEST THAT REARGUMENT BE CONSIDERED FOR THE PURPOSE OF CHANGING THE PRINCIPLE OF LAW LAID DOWN BY THIS COURT.

WE REALIZE THAT THE RULE LAID DOWN IN THE *CALDAROLA* CASE, *SUPRA*, AND IN THE CASE AT BAR WAS PROMPTED BY PRACTICAL AND

EQUITABLE CONSIDERATIONS AND WE DO NOT URGE ANY CHANGE THEREOF.

WE RESPECTFULLY SUBMIT THAT THESE AND OTHER SAFEGUARDS OF THE GOVERNMENT AND THEIR AGENTS LAID DOWN IN THE *CALDAROLA* CASE, *SUPRA*, AND THE CASE AT BAR, WOULD NOT BE WEAKENED OR IN ANYWISE AFFECTED BY A HOLDING IN THIS CASE THAT BECAUSE OF THE ACTS AND CONDUCT OF THE AGENT VIS-A-VIS THIS SEAMAN, THERE WAS CREATED THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE BETWEEN THEM, IRRESPECTIVE OF THE *INTER SE* RELATIONSHIP BETWEEN THE AGENT AND THE GOVERNMENT SHIPOWNER.

THE LIABILITY OF COSMOPOLITAN SHIPPING CO. INC. AS ONE ACTING FOR AN UNDISCLOSED PRINCIPAL IS CLEARLY ESTABLISHED BY THE EVIDENCE.

We respectfully call certain facts to this Honorable Court's attention that it may, if it deems fit in the furtherance of substantial justice, modify its recent decision herein.

Justice demands that where this Honorable Court has seen fit to change the law, after a jury has found in favor of a plaintiff, that all grounds that would tend to sustain said jury's verdict should be considered.

This is particularly fitting and proper where McAllister relied on the statement of this Court which was made as late as June 23rd, 1947, by the same majority as in the case at bar, that for the purposes of the Jones Act the General Agent was the employer of the seaman. *Caldarola* v. *Eckert*, 332 U. S. 155.

McAllister, who was crippled, including partial paralysis of one arm, complete paralysis of the lower part of his

body including both legs, and who, according to the jury and the unanimous opinion of the Court of Appeals for the Second Circuit, was damaged to the extent of $100,000.00 by the fault of the ship's personnel, should not be relegated to charity for his existence and that of his wife and children, without this Honorable Court considering each and every feature of this case which would support the jury's verdict.

This Honorable Court stated in its opinion in the case at bar that it accepts as sound the reasoning in the *Caldarola* case, *supra*.

That being so, McAllister being a seaman, is entitled under the authority of the *Caldarola* case, *supra*, to hold the Cosmopolitan Shipping Company liable as the employer for the purposes of the Jones Act. Accordingly, it seems in place to urge that this Court reconsider the decision herein, which reversed the Court below. Should this Honorable Court be disinclined to reverse itself in the case at bar, we respectfully ask that it consider the other feature of this case, which in our humble opinion supports the verdict.

This Honorable Court had its attention focused on the over-shadowing issue of a War Shipping Administration Agent's liability for a tort committed by ship's personnel and failed to treat with the question of Cosmopolitan's liability while acting for an undisclosed principal. The record clearly and unequivocally supports the fact that Cosmopolitan acted in its own name as principal and that the War Shipping Administration and the United States of America were undisclosed principals.

The chief officer, the person next in charge to the captain himself, gave evidence to this effect, as did others of the crew, including McAllister, as will be pointed out hereafter by reference to the record herein.

The evidence was that the stamp which purported to put McAllister on notice, that he was being employed by the

United States of America was not on the shipping articles when he signed them. This evidence supports only one conclusion, namely, that the defense that the stamp was on the articles at the time that McAllister and the other seamen signed the same, is false and untrue and created out of whole cloth. We feel that this Court should not be concerned with the determination of a factual issue. The jury obviously did not believe the defense that the aforesaid stamp was on the articles at the time the crew signed on, and accordingly such view should be adopted by an Appellate Court which is not concerned with issues of fact.

The lie is given to the defense not only by the Chief Officer's testimony but likewise by the purser who stated in the accident report that Cosmopolitan was the employer.

In spite of the fact that Cosmopolitan in its contract with the Government was merely a General Agent it held itself out to the world in general and to the ship's officers and crew in particular, as the operator. (See Plaintiff's Exh. 4 annexed hereto.) Folio reference to testimony on this point will be made hereinafter.

This Honorable Court in reversing the Court of Appeals for the Second Circuit, stated:

> "HUST was decided June 10, 1946; CALDAROLA June 23, 1947. Certainly from the latter date, the danger of relying on HUST was apparent to the world though it must be admitted there was enough uncertainty in the law properly to give concern to Congress. Notwithstanding there may be some undesirable results in overruling HUST, such as loss of rights under the Suits in Admiralty Act by reliance on HUST, we think that in view of CALDAROLA, the uncertainty as to remedies that the two decisions generate, and the desirability of clarifying the position of the United

States as an employer through the War Shipping Administration, that case should be and is overruled."

In the *Caldarola* case, 332 U. S. 155, Mr. Justice Frankfurter writing for the majority of the Court at page 159, speaking of the case of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, stated as follows:

"We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.'"

We assumed from the foregoing portion of the said opinion that this Court reaffirmed the principle laid down in the *Hust* case, *supra*, insofar as seamen were concerned.

We misunderstood that portion of the opinion of this Honorable Court in the *Caldarola* case, *supra*, and assumed that the Court was distinguishing the *Caldarola* case from the *Hust* case, whereas, we now find that this Court believes that the *Hust* case, *supra*, and the *Caldarola* case, *supra*, are not reconcilable. On the basis of these mitigating circumstances, we ask the indulgence of this Honorable Court to consider the plea for re-argument on a proposition of law which although present in the case at bar, was not urged heretofore, by reason of our complete reliance on our misinterpretation of the holding of the *Hust* case, and what we thought was in substance, a reaffirmance thereof in the *Caldarola* case, *supra*.

We pray this Honorable Court to consider the question of the liability of Cosmopolitan as agent for an undisclosed principal.

The General Agency Agreement has been interpreted by this Honorable Court to make the master and crew em-

ployees of the United States of America and not employees of the General Agent.

This Honorable Court went further and stated that only one entity could be sued as the employer under the Jones Act. Mindful of this holding by this Honorable Court we nevertheless respectfully call attention to the fact the record shows that although the Cosmopolitan Shipping Company was under a contractual obligation to act only as agent of the United States of America, it did not so act. Factually, the record shows that Cosmopolitan Shipping Company hired McAllister as its own employee.

Pages 104 through 108 of the record show clearly that the plaintiff was given to understand and thought that he was being employed by the Cosmopolitan Shipping Company. The following quotation from page 107, fol. 321 of the record sums up all the testimony on this point in a few unequivocal words:

> "Q. From that conversation and from that interview what was your understanding as to who was hiring you? A. The Cosmopolitan Shipping Company."

Furthermore, the plaintiff was not alone in this understanding. On page 25 of the record, fols. 73, 74, George A. Linnartz, the chief officer testified that he was employed by the Cosmopolitan Shipping Company. Indeed, at page 26 in fol. 77, Linnartz further testified that no other entity than Cosmopolitan Shipping Company was mentioned to him as his employer and that he received his pay from the Cosmopolitan Shipping Company.

At page 89 of the record, fol. 267, Fred A. Bentz, a member of the engine department, upon being asked who was his employer replied that it was the Cosmopolitan Shipping Company.

At page 323 of the record, fol. 969, the testimony of Floyd Bullis, the acting first assistant engineer aboard the S.S. Edward B. Haines, is further example that the seamen understood that they were being employed by the Cosmopolitan Shipping Company.

This being so, the Cosmopolitan Shipping Company is liable as the actual employer in fact of McAllister, and liable as such under the Jones Act, notwithstanding the contract *inter se* between it and the United States of America which called for an entirely different relationship.

Factually, it is proven that the stamp purporting to put McAllister on notice that he was being hired on behalf of the United States of America was placed there after McAllister had signed the shipping articles, as it was not there when he signed the articles.

McAllister testified on page 109, fol. 327, that the first time he recalled seeing the stamp on the articles which read "you are being employed by the United States", was when the articles were offered in evidence at the trial.

We feel that justice demands that the jury's verdict be sustained notwithstanding the fact that this Court ruled that the General Agent cannot be held liable in a Jones Act case. This Honorable Court apparently assumed that the principal was disclosed. The verdict can be supported on the proposition of law that the Cosmopolitan Shipping Company is liable as the agent for an undisclosed principal.

This proposition of law has substantially been conceded by the government in its brief in support of petition for writ of certiorari in footnote, page 111.

The Government not only conceded that this was the law, but cited the following cases in support thereof: *Lewis* v. *U. S. Navigation Co*, 57 F. Supp. 652, and *Morse* v. *Alaska Packers Association*, 70 Cal. Appeals 2nd 857. In this connection we also cite *Charles T. Banks, et al.* v. *Charles*

Kerr Company and Independent Pier Company, 69 F. Supp. 61.

McAllister respectfully prays for modification of this Honorable Court's decision herein to the extent that his verdict be sustained on the Law of Agency applicable to agents of undisclosed principals. Should this Honorable Court entertain some doubt as to the sufficiency of the proof to support McAllister's prayer, then as alternative relief McAllister prays that this sole issue of fact be re-submitted for determination by a jury in the District Court below, this Honorable Court having done as much in the *Weade* case, which was argued together with the case at bar, though treating with a different factual issue, and for such other and further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

BERTRAM J. DEMBO,
Attorney for Petitioner.

Plaintiff's Exhibit 4

REPORT OF ILLNESS

S. S. Edward B. Haines Voy. No. 7

Owner or Operator Cosmopolitan Shipping Co., Inc.

Date of Sailing July 31, 1945

1. The Patient
Name (In Full) McAllister, Robert Alexander
Certificate No. Z-272774
Address 235 Bertsch Street, Lansford, Pa.
Rating Second Engineer Citizen or alien Citizen
Age 25 Color White Sex Male
Married or single Married
Name of nearest relative Ann McAllister
Relationship Wife Address same as above.

2. (a) In whose employment when taken ill Cosmopolitan Shipping Company, Inc.
(b) How long employed 4½ months
(c) Wages per Month $220.00 per month

3. (a) Date man-signed on July 20, 1945
(b) Where New York
(c) Articles (Foreign) F.
(d) Did he submit to physical examination prior to employment? Yes.
(e) By whom examined WSA (New York)
(f) Where examined 107 Washington St.

4. (a) Date Discharged December 1st, 1945
(b) Where Tsingtao, China
(c) Before whom Captain Leavitt.
(d) Amount of wages paid Advance ($76.02)
(e) Disposition personal effects Cared for by patient.

4. Date crew paid off for this voyage .....
   (a) Date expected to terminate voyage: .....
   (b) Port .....

6. Illness contracted: (a) Date 11/24/45
   (b) Hour .....
   (c) Place At Sea (aboard)
   (d) To whom first reported Patrick E. Napier, Psr. Ph. M.
   (e) When same day
   (f) Location of vessel when illness first reported At Sea—Shanghai toward Tsingtao
   (g) Sick person's version of how illness was contract and cause thereof: .....
   .....

ROBERT A. MCALLISTER
(Sick persons signature)

7. Physical signs and symptoms .....
   .....

8. Diagnosis (for observation).

(Stamp)
Reported to
Marine Index Bureau
60 John Street, New York
Date sent 12/28/45

9. Treatment (give full details).....
   .....

10. Condition of patient on discharge from vessel no appetite, dizziness, unable to hold food on the stomach—weak.

11. Final disposition of patient .....

.....

12. If sent to hospital, state where, when admitted, and at whose request Division Field Hospital #1, 6th Marine Div. Tsingtao, China. Admitted 11/30/45. Lt. Cmdr. D. J. Giorgio USN—MC.

13. Probable period of disability .....

14. Witnesses version as to whether disability due to misconduct .....

.....

15. If ill before embarkation, by whom treated No.
(a) Where ..... (b) How long .....

16. Similar previous illness if any; (a) When .....
(b) Where ..... (c) Detail .....

.....

17. Remarks .....

.....

Names of Persons Who Knew of Illness and Treatment Afforded

Patrick E. Napier, Purser/Ph. M.
Home and Mailing Addresses
Route 12 Box 220 Sayler Park
Station—Cincinnati 33, Ohio

Certificate

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Honorable Sirs:

The undersigned attorney for the petitioner hereby certifies that the Petition for Rehearing of Decision herein is presented in good faith and not for the purpose of delay.

Respectfully submitted,

BERTRAM J. DEMBO,
Attorney for Petitioner.

Dated, New York, New York, June 30, 1949.